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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, EX REL., DEPARTMENT OF AGRICULTURE,

Respondent.

MOTION FOR LEAVE TO FILE ANNEXED STATEMENT AS TO JURISDICTION.

Now come Morris Karon and Walter D. Corrigan, Sr., counsel for appellant, Gilbert Reuter, and members of the bar of this Court and move for leave to file the annexed Statement as to Jurisdiction.

We failed to file the annexed Statement when we presented appellant's petition for allowance of the appeal because we were so pressed for time in preparing the other documents necessary for the allowance of the appeal before the Supreme Court of Wisconsin adjourned (after which it might have been difficult to reach the Chief Justice) that we had no time to prepare the Statement. Also, the respondent's attorney insisted that we seek the allowance of the ap-

peal and get the record to the Supreme Court of the United States at Washington by June 3, 1941, or he would enforce the judgment appealed from. We simply could not prepare a proper Statement in the very short time we had to take the appeal.

Dated at Milwaukee, Wisconsin, June 13, 1941.

MORRIS KARON,
WALTER D. CORRIGAN, SR.,
710 North Plankinton Avenue,
Milwaukee, Wisconsin,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 185

GILBERT REUTER,

Appellant,

vs.

STATE OF WISCONSIN, EX REL., DEPARTMENT OF AGRICULTURE,

Respondent.

STATEMENT AS TO JURISDICTION.

Pursuant to the requirement of Rule 12 of this Court, appellant submits the following statement as to the jurisdiction of this Court:

(a) This case is brought to this Court pursuant to the provisions of Section 237 of the Judicial Code as amended (28 U. S. C. A. Sec. 344), which permits an appeal from a final judgment in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(b) The State statute, the validity of which is challenged, is Subsection 5(a) of Section 100.03 of the Wisconsin

Statutes, and is found in the official printed edition of the Wisconsin Statutes for the year 1939, at page 1481, which reads as follows:

> "(5) (a) The department shall have jurisdiction upon its own initiative or upon petition in writing to inquire into and determine the regulated milk markets, of the state, and to inquire into any matter pertinent to regulation under this section in any such market and to prescribe such terms and conditions for the purchasing, receiving, handling or selling of regulated milk in such market as it shall find necessary to eliminate unfair methods of competition or unfair trade practices, *which terms and conditions may include schedules of prices for producers, dealers and consumers, or either, and labeling.* * * *."

Appellant also challenged the legality and validity of the order of the respondent, Department of Agriculture of the State of Wisconsin, which, under the foregoing subsection of the statute, created Milwaukee County as a regulated milk market, and required dealers to charge, and buyers to pay, a minimum price of 11¢ per quart retail for milk of 3.8%, or less, butterfat (Complaint, R. 7). The appellant's answer denied the legality and validity of the respondent's order on the ground that the price schedule prescribed by the respondent is based upon a credit and delivery system, whereas appellant did business on the cash and carry plan, by reason of which he could sell at lower prices (Answer, R. 11).

The respondent contended in the Supreme Court of Wisconsin that the reenactment by the Wisconsin Legislature, of Section 100.03 in 1939, substantially the same as the statute was enacted by the 1937 session of the Wisconsin Legislature, enacted into law the aforementioned order of the respondent.

(c) The date of the final judgment of the Supreme Court of Wisconsin sought to be reviewed is March 11, 1941 (R.

43), but appellant's motion for rehearing was not denied by the Supreme Court of Wisconsin until May 20, 1941 (R. 60). Hence, the judgment did not become final until May 20, 1941. The petition for appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Wisconsin on June 3, 1941 (R. 65).

This appeal is from a final judgment of the Supreme Court of Wisconsin (R. 43) affirming a judgment of the Circuit Court of Milwaukee County, Wisconsin (R. 25), which judgment, among other things, enjoined the appellant from—"3. Selling fluid milk and cream at retail in Milwaukee County for less than the retail prices and in other than the units prescribed in the market order under Section 100.03 of the statutes."

The respondent's complaint (R. 7-10) alleged that the appellant was a retail milk dealer, operating a milk store in Milwaukee County, Wisconsin, and sold such milk at retail for 30¢ per gallon and 9¢ per quart, being less than the minimum price fixed by the respondent's price order. (Other allegations of the complaint are not material to this appeal.)

In his Answer (R. 11) the appellant challenged the legality and validity of the statute and order aforementioned on the ground that "the minimum prices fixed by the Department (respondent) are unjust, inequitable, discriminatory and unfair, and are based on the delivery of milk and cream to the consumer and have no relation to the cash and carry plan under which plan this defendent, Gilbert Reuter, is operating."

The Answer was amended by appellant to challenge the constitutionality of the law, and alleged that the law is unconstitutional—

> "In that it (the statute) is violative of the 14th Amendment of the Federal Constitution by denying to the defendants the equal protection of the laws, by

depriving them of liberty without due process of law in that it delegates judicial and legislative powers to an administrative agency; in that it violates Article I, Section I of the State Constitution by depriving them of life, liberty and the pursuit of happiness, in that it confiscates their property and denies them the right to engage in a lawful calling."

Such amendment to the answer was allowed by the trial court (Bill of Exceptions, R. 30-1).

During the trial of the case in the Circuit Court, appellant again challenged the legality and validity of the statute and order, claiming that the order violated appellant's constitutional rights (Bill of Exceptions, R. 36-8).

The Circuit Court overruled appellant's objections to the constitutionality of the statute and order, and granted respondent a judgment enjoining appellant from selling milk below the price fixed by the Respondent's order (R. 25-27).

In the Supreme Court of Wisconsin the appellant assigned as error (1) that the statute was unconstitutional in violation of the Fourteenth Amendment to the Constitution of the United States; (2) that the statute failed to set up proper standards for fixing prices, and was an unlawful delegation of legislative power to the Department of Agriculture; and (3) that the appellant was denied equal protection of the laws by the mode of administration of the Act (meaning the enforcement of the respondent's minimum price order). The opinion of the Wisconsin Supreme Court (R. 44-53) states (p. 3 of opinion) that the aforementioned issues were raised by appellant in that court.

Under the Wisconsin Supreme Court Rules (*Rule 10, Section 251.264 Wisconsin Statutes, 1939*) *assignments of error* may not be, and hence were not, set forth in a separate pleading, but are required to be stated, and hence were stated, in the appellant's brief (pp. 2 and 3) in that court.

The Supreme Court of Wisconsin is the highest court of

that State in which a decision in the case can be had. The *Constitution of Wisconsin, Article VII, Section 2,* provides:

> "The judicial power of this state both as to matters of law and equity shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. * * *".

Section 3, Article VII of the Wisconsin Constitution provides:

> "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same."

The constitutional grant of original jurisdiction and power of the Supreme Court is supplemented by *Section 251.08 of Wis. Stats., 1939* (p. 2483), which provides:

> "The supreme court shall have and exercise an appellate jurisdiction only, except when otherwise specially provided by law or the constitution, which shall extend to all matters of appeal, error or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record and shall extend to all questions of law which may arise in said courts upon a motion for a new trial, in arrest of judgment, or in cases reserved by said courts."

Section 251.11 (1) Wis. Stats., 1939 (p. 2484) provides:

> "The supreme court shall be vested with all power and authority necessary for carrying into complete execution all its judgments and determinations in the matters aforesaid and for the exercise of its jurisdiction *as the supreme judicial tribunal of the state.* * * *"

The constitutional rights set up in Appellant's Answer and urged in the trial court and in the State Supreme Court, as heretofore shown, are rights invoked under the Federal Constitution (Fourteenth Amendment).

Both the trial court and the State Supreme Court denied appellant those constitutional rights. On page 3 of the Supreme Court's opinion (R. 46) the Supreme Court expressly adverted to appellant's assertion of those constitutional rights, and by affirming the judgment of the trial court, it denied appellant's rights thus asserted. The case, therefore, comes within the jurisdiction of this Court under Section 237 of the Judicial Code as amended (28 U. S. C. A. Sec. 344), which permits an appeal from a final judgment of the highest court of the State in a suit in which the validity of a statute of the State is questioned as being repugnant to the Federal Constitution and the State court decision is in favor of the validity of the statute challenged.

Even where the State court does not expressly determine a constitutional question, this Court has the power to review.

> "Whether the State Supreme Court denied that (constitutional) right or failed to give it due recognition is a question upon which the plaintiffs (appellants) are entitled to invoke the judgment of this court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." *Fox River Paper Co.* v. *R. R. Com. of Wis.*, 274 U. S. 651, 653, 71 L. Ed. 1279 (and cases cited).
>
> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear

intendment that this was done, the claim is to be regarded as having been adequately presented." *New York* v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184.

To the same effect are:

Ferris v. *Frohman*, 223 U. S. 424, 56 L. Ed. 492;

Columbia Water Power Co. v. *Columbia Electric S. R. Co.*, 172 U. S. 475, 43 L. Ed. 521;

St. Louis etc. R. Co. v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179;

Am. Express Co. v. *Iowa*, 196 U. S. 133, 49 L. Ed. 417;

Brinkerhoff etc. Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107 (constitutional question raised for first time on rehearing in State Supreme Court).

Appellant has the right to challenge the constitutionality of the respondent's order as well as the State statute under Section 237 of the Judicial Code, as amended (28 U. S. C. A. Sec. 344). This Court has specifically held in *Hamilton* v. *University of California*, 293 U. S. 245, 79 L. Ed. 343, that the phrase "statute of any state" as used in Section 237 of the Judicial Code, is not limited to acts of the State legislature, but is used to include every act, legislative in character, to which the State gives sanction; and the Supreme Court may accordingly review a decision of a State court affirming the constitutional validity of an order of the Board of Regents of the State university making military instruction compulsory.

Here, the respondent, Department of Agriculture, is an administrative agency of the State of Wisconsin (*Sec. 93.02, Wis. Stats., 1939*, p. 1370 et seq.), and the order enforced by the judgment of the State court is legislative in character, to which the State of Wisconsin gives sanction. Respondent's complaint for enforcement of the order shows that the market order enforced by the judgment was made under authority of *Section 100.03, Wis. Stats., 1939* (R. 7).

The questions here involved are not only substantial, but are of the utmost importance to all milk dealers in the State of Wisconsin, as well as to the appellant and to the 3,000,000 consumers of milk and dairy products in the State of Wisconsin.

That *Section 100.03, Wis. Stats., 1939,* is unconstitutional, because it contains an unlawful delegation of legislative power (price fixing to dealer and consumer) has been expressly held by this Court in *Schechter* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446. The State Supreme Court's decision upholding the validity of the statute squarely conflicts with those decisions of this Court.

That the respondent's price order is unconstitutional as a denial of due process, equal protection and freedom of contract in violation of the Fourteenth Amendment of the Federal Constitution is elementary. Admittedly, the minimum price order is based on the cost of credit and delivery sales of milk and cream to the consumer. To require appellant, who sells only on the cash and carry plan, to charge, and the consumer to pay, the same price as the credit and delivery dairies, requires appellant to charge for a credit and delivery service he does not perform, and requires his customers to pay for a service which they do not get and do not want. Appellant has thousands of customers who insist on their right to purchase milk and other dairy products on a cash and carry basis to save the expense of credit and delivery. Appellant is able to make a reasonable profit, although he sells milk from 12¢ to 16¢ per gallon less than the price fixed by the respondent's minimum price order.

There is but little authority on this question, because in most of the cases which sustained price-fixing orders made by administrative agencies, price differentials were allowed between the cash and carry and credit and delivery sales.

In the following cases it was held that a minimum price order of an administrative agency, which prohibited a differential in price for different types of service, was arbitrary and unconstitutional.

State v. *Neveau*, — Wis. —, 294 N. W. 796 (barber code price order);

Great A. & P. Tea Co. v. *Ervin*, 23 Fed. Supp. 70 (1938);

Culberson v. *Ashford*, 18 S. W. (2d) 585 (Tex.).

Accord, *Fairmount Co.* v. *Minnesota*, 274 U. S. 1, 71 L. Ed. 893.

It seems elementary that such an order is arbitrary and tyrannical against both dealers and consumers and violative of the due process, equal protection and right to freedom of contract under the Fourteenth Amendment, when an administrative agency requires a charge and payment for a service that is neither performed nor received.

Copy of the opinion of the State Supreme Court (Exhibit 1) and of the trial court (Exhibit 2) are hereto annexed.

Dated, Milwaukee, Wisconsin, June 12, 1941.

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WALTER D. CORRIGAN, SR.,
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Milwaukee, Wisconsin.
Attorneys for Appellant.

EXHIBIT 1.

STATE OF WISCONSIN, IN SUPREME COURT, JANUARY TERM, 1941.

Nos. 7, 8, 9, & 10.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

JOHN MARRIOTT et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

GILBERT REUTER et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

SYLVESTER T. BAUER et al., *Appellants*.

STATE EX REL. DEPARTMENT OF AGRICULTURE, *Respondent*,

v.

RAYMOND KUNZ et al., *Appellants*.

Appeals from judgments of the circuit court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. *Judgments affirmed.*

These are actions brought by the State of Wisconsin on relation of the Department of Agriculture against the several defendant-appellants under section 100.03 Stats. of 1939 to enforce the provisions of a general market order of the Department of Agriculture and Markets relating to the Milwaukee regulated milk market. The actions were commenced separately, were consolidated for the purpose of trial, and separate judgments were entered on March 30, 1940. Defendants appeal.

The complaints in substance allege that Milwaukee is included in a regulated milk market under sec. 100.03 Stats., 1939; that the provisions of the general order of the Depart-

ment of Agriculture relating to the Milwaukee regulated milk market has been violated by the several defendants with respect to the prices paid to the producers on the basis of 3.5 per cent milk for the milk handled by the defendants; that defendants buy outside of the Milwaukee regulated area at wholesale at prices below the wholesale price either by quart or gallon prescribed by the order; that defendants are selling at retail below the minimum retail prices; that the milk handled is not from premises and equipment equal in sanitation to that required by the ordinances of the city of Milwaukee. The complaint further alleges certain nonconformance with the labeling provision of the order.

By the judgment entered in each action, each defendant is enjoined from (1) selling in Milwaukee county in fluid form milk for which the producers do not receive the price prescribed in the market order under sec. 100.03 Stats.; (2) purchasing at less than the wholesale price prescribed in the market order milk and cream for resale in fluid form in Milwaukee county; (3) selling fluid milk and cream at retail in Milwaukee county for less than the retail prices and in other than the units prescribed in the market order; (4) selling at retail in Milwaukee county fluid cream not labeled as required by the market order; (5) purchasing, receiving, or handling for sale in fluid form in Milwaukee county, or selling in fluid form in Milwaukee county, milk from premises and equipment not equal in sanitation to that required by ordinance of the city of Milwaukee; and (6), from otherwise violating any provision of the present market order for Milwaukee county under sec. 100.03 Stats.

The defendants do not challenge any of the court's findings. In their brief they state the issues as follows: (1) whether the 1939 amendment to sec. 100.03 renders the statute unconstitutional under Section One of the Fourteenth Amendment to the United States Constitution or Section One, Article One of the Wisconsin Constitution; (2) whether the pretended standards set for fixing prices were sufficiently definite to meet the requirements of a valid delegation of legislative power; and (3), whether the defendants have been denied the equal protection of the law by reason of the mode of administration of the act.

MARTIN, *J.*:

The bill of exceptions applicable to each of the four actions contains the following stipulation:

"This stipulation is made upon agreement which is a part of the stipulation that the appellants will challenge on appeal only the constitutionality of the Milk Control Law because of discrimination, unlawful delegation of power, and absence of legislative standards for fixing price, and also the other points of the unconstitutional enforcement of the law."

The first Milk Control Law was enacted as ch. 64, Laws of 1933. It was entitled: "Emergency regulation of the distribution of milk in certain municipalities". Sec. (1) provided:

"It is declared that the provisions of this section are made necessary by a public emergency existing since November 1, 1932, growing out of the present economic depression, the present financial condition of the farmer delivering milk to certain city markets, unfair methods of competition of certain dealers buying milk for resale in such city markets, which conditions seriously affects and endangers the public welfare, health and morals. The provisions of this section shall apply to cities of the first, second and third class having municipal ordinances requiring that all pasteurized milk sold in such cities shall be pasteurized within the limits of the county in which said cities are located, and shall also apply to cities, villages, and to towns adjacent to any city or village, in the same county whose population is furnished with milk by any dealer or dealers operating generally in such cities of the first, second and third class."

The provision limiting the application of sec. (1) of ch. 64 to cities of the first, second and third class having municipal ordinances relative to pasteurized milk was stricken from the act by an amendment, sec. (14) of ch. 470, Laws of 1933. The law as amended became sec. 99.165 Stats. of 1933. It contained a severability clause. The law terminated two years after passage and publication. By amend-

ment in 1935, sec. 99.165 became sec. 100.03 Stats. Subdivision (1) (b) of this section provided that it should apply to cities of the first, second, and third class and to cities of the fourth class having a population of at least five thousand according to the last federal census, also to cities, villages and towns adjacent to any city or village whose population is furnished milk by any dealer operating generally in such cities of the first, second, third, and fourth class. The 1935 act contained a severability clause. The law by its terms terminated June 30, 1937.

By ch. 369, Laws of 1937, sec. 100.03 and 100.04 were repealed and sec. 100.03 was re-enacted. It had no territorial limitations. It was state-wide in its application. It was designated as emergency legislation and terminated not later than December 31, 1939. It contained the following severability clause (100.03 (12), Stats., 1937):

"It is intended that each provision of this section, without regard to whether or not more than one provision is incorporated in the same subsection or subdivision, shall be severable, except provisions that necessarily are so dependent the one upon the other that the one cannot stand without the other; particularly, but without limitation, each exception, express or implied, is severable from each other provision, including each other exception; and if any exception be invalid, this section shall be in force without such exception; and if any provision or exception shall be invalid as to any person, thing or circumstance, the provision or exception shall be construed to except such person, thing or circumstance from its terms."

Sec. 100.03 Stats. of 1937 was amended by ch. 512, Laws of 1939, effective October 17, 1939. This chapter did two things. First it extended the life of sec. 100.03 two years; that is, it provides:

"(2) This section shall cease to be of force or effect when the department shall determine that economic unbalance or unemployment no longer so materially interferes with the ability to produce, to consume, to bargain, or to deal in the production or distribution of fluid milk in Wisconsin as to

continue measurably to threaten results as recited in subsection (1), but in any event not later than December 31, 1941. The department's determination, to whatever effect, shall be in the form of a general order and may be reviewed as such and not otherwise."

It further provides:

"The provisions of this section shall not apply to towns, villages and cities of the fourth class, unless the same are located in a county containing a population of more than seventy thousand."

We will first consider whether the 1939 amendment to sec. 100.03 renders the statute unconstitutional under Section One of the Fourteenth Amendment to the United States Constitution or Section One, Article One of the Wisconsin Constitution, because if the 1939 amendment is unconstitutional, the Milk Control Law by its specific provision (subsection (2) of sec. 100.03 Stats., 1937) expired not later than December 31, 1939. By ch. 512, Laws of 1939, the operation of sec. 100.03 was extended from December 31, 1939 to December 31, 1941. The chapter then provides that the provisions of sec. 100.03 shall not apply to towns, villages and cities of the fourth class unless the same are located in a county containing a population of more than seventy thousand. A substantially similar provision in the Trade Practice Standards Act was held unconstitutional in *State* v. *Neveau*, — Wis. —, 294 N. W. 796, as setting up an improper classification. The unconstitutionality of the classification under ch. 512, Laws of 1939 is virtually conceded by the state upon these appeals. The question is whether the 1939 act, being constitutional in so far as it extends the operation of the Milk Control Law and unconstitutional in so far as it seeks to impose new territorial limitations upon the act is severable in such a way as to save the valid extension features. While the matter is not free from difficulty, we conclude that it is severable. The question is, of course, whether that portion of the act containing the territorial limitations was so important an inducement to its passage as to lead to

the conclusion that the legislature would not have extended the operation of the Milk Control Act without the limitations. In order to answer this question it is important to consider what in effect the legislature did in the portion of ch. 512 which extends the operation of the Milk Control Act. We consider this extension to be a species of re-enactment and the effect is the same as though the existing law which expired on December 31, 1939 had been set out in full in ch. 512, Laws of 1939. Had this been done, the severability clause of the earlier act would have appeared in ch. 512. The fact that it does not so appear we deem immaterial, as there is here virtually an incorporation by reference.

The matter therefore, comes down to this: that the legislature determined to extend the operation of an earlier act which contained a broad severability clause, and when, in addition to this extension, it amended the earlier law, it is a fair conclusion that the amendment was to be as subject to the severability clause as any of the other existing provisions of the extended law. In other words, in determining the severability of the 1939 law, we ought to consider the matter as though the extended law fully amended as to its territorial scope and containing its original severability clause had been fully set forth in the Law of 1939. Under these conditions we think there would be little doubt as to the severability from the act of the invalid territorial limitation which we strike down and a sustaining of the act on the basis of its original territorial scope.

While not strictly in point here, for the reason that we conclude that the severability clause of the 1937 law should be considered a part of the 1939 amendment (ch. 512, Laws of 1939) as though it had been fully set forth in said amendment, by way of analogy at least, there is applicable the rule that an amended statute is to be given the meaning that it would have had if it had read from the beginning as amended. See *State* v. *Local Board of Review* (Iowa), 283 N. W. 87, 92 and cases cited. See also 59 C. J. 1096, sec. 647 and cases under note 24, and *United States* v. *La Franca*, 282 U. S. 568, 576, 51 S. Ct. 278, 75 L. Ed. 551, 557.

Appellants contend that sec. 100.03 (5) (a) constitutes an unconstitutional delegation of legislative power to the Department of Agriculture because no proper standards have been set by the legislature. We consider that appellants' argument in this respect is ruled to the contrary by the decision of this court in *State ex rel. Finnegan* v. *Lincoln Dairy Company*, 221 Wis. 1, 265 N. W. 197, 851, in which the constitutionality of the 1935 Milk Control Law was challenged on substantially the same grounds as urged in the instant case. That law was held valid. To the same effect see *Petition of State ex rel. Attorney General.* (*Tavern Code* Case), 220 Wis. 25, 264 N. W. 633.

Appellants further contend that they were denied the equal protection of the law by reason of the mode of administration of the Milk Control Act. At the trial, in support of this contention, they offered evidence to show that a certain farmer in Waukesha county had shipped fluid milk to the city of Milwaukee and was paid a flat price for it. No objection was made to the particular question and answer. The question was "Q. And on what basis do you ship to them? A. I am paid by the Milwaukee Dairy Distributors a flat price." Then the witness was asked "Q. What do you get? to which counsel for the plaintiff objected as being immaterial. After hearing extended argument by counsel for the parties, the court sustained the objection. From such transcript of the record as is contained in the bill of exceptions, we are of the view that the trial court did not err in excluding this evidence. If the operation of a valid law could be defeated by showing that in some instances other persons or parties violated the law, we fear that a general break-down in law enforcement would follow. Those charged with the enforcement of the Milk Control Act cannot pursue all violators at the same time. In the instant cases there is no showing of nor any proper offer of proof to show an unconstitutional enforcement of the law.

While we differ with the trial court in its conclusion as to the constitutionality of the territorial limitations of the 1939 amendment, it does not necessitate any modification of the several judgments, therefore same must be affirmed.

By the Court: Judgments Affirmed.

IN SUPREME COURT, STATE OF WISCONSIN, JANUARY TERM, 1941.

No. 7

STATE EX REL., DEPARTMENT OF AGRICULTURE,
Respondent,

vs.

JOHN MARRIOTT, ET AL.,
Appellants.

FOWLER, J. (Dissenting) I agree with the opinion of the court that the concluding sentence of sec. 1, Ch. 512, Laws of 1939, stated in the opinion, p. —, is unconstitutional. This sentence was incorporated in the act by amendment of the bill as first introduced. It was held in *State ex rel. Hickey* v. *Levitan*, 190 Wis. 646, 669, 210 N. W. Ill., and *Fitger* v. *Kremer*, 199 Wis. 341, 226 N. W. 310, that when an unconstitutional provision is so incorporated in an act, and the act would not have been passed but for the amendment, the act is invalid, notwithstanding that but for the amendment it would have been valid.

The mere fact that Ch. 512 as a whole shows that the legislature intended that the existing milk control statutes should not be applied to towns and villages and cities of the fourth class unless the same were situated in counties of 70,000 population, demonstrates that the legislature did not intend that those statutes should be applied throughout the state. The decision of the court makes this statute apply throughout the state contrary to the express declaration and intent of the legislature. In the *Hickey* case, *supra*, p. 670, it is said, quoting from *Connolly* v. *Union S. P. Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, the "logic of which the *Hickey* opinion declares to be uncontrovertible,"—

"Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety and in that view it must be adjudged to be unconstitutional

as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section."

In the *Fitger Case*, p. 341, it is said of a like situation that the "history of the statute leaves no room for such a conclusion (of severability). As originally introduced it did not contain the exemption provision. That came in as an amendment to the original bill, and the court cannot say that it was not an inducement to the passage of the law."

Thus the legislative history of Ch. 512 shows conclusively that the act would not have passed the assembly but for the incorporation of the unconstitutional provision by amendment. The act is therefore void in its entirety, just as were the acts involved in the two cases cited.

The opinion of the court attempts to avoid the effect of the incorporation of the unconstitutional provision by amendment by saying that the chapter was in effect a reenactment of the existing milk control statute, and reenacted the severability provision of that statute, and that the severability provision of that statute saves the constitutional portion of Ch. 512. This to my mind is a manifest *non sequitur*. Ch. 512 being invalid in its entirety it did not reenact the existing statute and therefore did not reenact its severability provision.

It has been the habit of the legislature for several years past to attach a severability clause to all statutes containing several provisions as to the constitutionality of some of which there was doubt. If the legislature intended to save the first part of its section 1 by a severability clause why did it not add to it such a clause? This would have been an easy, plain and habitual way of repelling the inference that the adding of the unconstitutional provision by amendment did not induce the enactment of the chapter. That the legislature did not use its usual tactics in enacting Ch. 512 would seem to indicate intention that the chapter should stand or fall with the portion added by amendment. But whether the legislature so intended or not, Ch. 512 for the reason stated is void, and therefore did not reenact anything.

I am authorized to state that Mr. Justice Fritz concurs in this dissent.

EXHIBIT 2.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

STATE OF WISCONSIN, ex rel., Department of Agriculture, Plaintiff,

vs.

GILBERT REUTER, JOHN MARRIOTT, RAYMOND KUNZ, SYLVESTER T. BAUER, and others, Defendants

Decision

This is an action brought by the State of Wisconsin on relation of the Department of Agriculture under the provisions of Section 100.03, Wisconsin Statutes, to enforce the provisions of a general market order of the Department of Agriculture & Markets relating to the Milwaukee Regulated Milk Market. These actions were commenced separately against the respective defendants but were consolidated for the purpose of trial. The complaints allege substantially that Milwaukee is included as a regulated milk market under Section 100.03 of the statutes; that the provisions of the general order of the Department of Agriculture relating to the Milwaukee Regulated Milk Market have been violated by the various defendants with respect to the prices paid to producers on the basis of 3.5 per cent milk for the milk handled by these defendants; that defendants buy outside of the Milwaukee Regulated Market area at wholesale at prices below the wholesale prices either by quart or gallon prescribed by the order; that the defendants are selling at retail below the minimum retail prices; that the milk handled is not from premises and equipment equal in sanitation to that required by the ordinances of the City of Milwaukee; and the complaints further allege certain non-conformance with the labeling provision of the Order.

Defendants contend that the Order of the Department of Agriculture and Markets relating to Milwaukee is invalid and that Section 100.03, pursuant to which the Order was made, is invalid and unconstitutional because, it is claimed, it is based upon an improper and unreasonable classification and because it violates Section 1 of the Fourteenth Amend-

ment of the United States Constitution and Section 1, Article I of the Wisconsin Constitution.

Section 100.03 (2) provides "* * *. This provision of this section shall not apply to towns, villages and cities of the fourth class, unless the same are located in a county containing a population of more than seventy thousand." This, it is contended by the defendants, is an unreasonable and improper classification. This point, however, has been decided adversely to defendants' contention in *State ex rel. Finnegan* vs. *Lincoln Dairy Co.*, 221 Wis. 1, where the court said of the 1935 law which exempted municipalities under five thousand:

"In the sale and distribution of milk and its products, the conditions which obtain in cities of any considerable size are widely different than those which obtain in the smaller towns and villages. The basis of the classification would appear much more clearly if the act by its terms applied only to the cities of the first, second and third class. However, the conditions which obtain in the smaller villages and towns where the buyer is personally acquainted with the dealer, and the products distributed are produced locally, are very different than those obtaining in more densely populated areas. We cannot say that the classification has no proper basis in reason. * * * It is considered that the classification has a sound basis in reason and in fact and that the act is not discriminatory in that respect."

The classification in question does not conflict with the rule of equal protection and should not be held invalid upon that ground.

I am of the opinion, after a consideration of arguments and briefs submitted, that the General Market Order relating to the Milwaukee Regulated Fluid Milk Market is valid and that the provisions of Section 100.03 are valid and constitutional.

Defendants offered on the trial to show that the method of enforcement was such as to render the act unconstitutional. This offer was excluded on the ground it was deemed irrelevant to the issues. The testimony so offered was properly excluded. Even if it were established that in some respects not applicable here, the act is violative of

some provision of the constitution, it would not follow that the entire act is so. The statute contains a clear and comprehensive provision with respect to severability. 100.03 (2) provides:

"It is intended that each provision of this section, without regard to whether or not more than one provision is incorporated in the same subsection or subdivision, shall be severable, except provisions that necessarily are so dependent the one upon the other that the one cannot stand without the other; particularly, but without limitation, each exception, express or implied, is severable from each other provision, including each other exception; and if any exception be invalid, this section shall be in force without such exception; and if any provision or exception shall be invalid as to any person, thing or circumstance, the provision or exception shall be construed to except such person, thing or circumstance from its terms."

A more certain declaration of severability could hardly be stated.

The General Order of the Department of Agriculture regulating the Milwaukee Fluid Milk Market is a continuing order of a public administrative body and therefore the discontinuance of an alleged violation after suit commenced does not render the controversy moot.

Trade Comm. v. *Goodyear*, 304 U. S. 257;
State vs. *Manske*, 285 N. W. 378.

I find the following findings to be true and correct and they are therefore adopted as the findings of the court:

Plaintiff's Proposed Finding No. 1.
Plaintiff's Proposed Finding No. 2.
Plaintiff's Proposed Finding No. 3.
Plaintiff's Proposed Finding No. 4 is amended to read as follows:

Each of the said defendants purchased milk outside of Milwaukee County from others who purchased the milk from producers and received it at their plants outside of Milwaukee County and for which the producers have at various times received less than the above prescribed producer prices for milk sold as fluid milk and for which said defendants have at various times paid less than the above

prescribed wholesale prices and which each has sold in fluid form at retail at his store in Milwaukee at various times for less than the above prescribed retail prices and some of which they sold at retail in gallon lots.

Plaintiff's Proposed Finding No. 5 is amended to read as follows:

Each of the said defendants also purchased cream outside of Milwaukee County from others who purchased the milk from producers and received it at their plants outside of Milwaukee County and for which cream, these defendants have at various times paid less than the above prescribed wholesale prices and which each has sold in fluid form at his store in Milwaukee County for less than the prescribed retail prices.

Plaintiff's Proposed Finding No. 6 is found to be true and correct and is, therefore, adopted as the finding of the court.

Plaintiff's Proposed Finding No. 7 is found to be true and correct and is, therefore, adopted as the finding of the court.

Plaintiff's Proposed Finding No. 8 is found to be true and correct and is, therefore, adopted as the finding of the court.

The following Conclusions of Law are found to be true and correct and are, therefore, adopted as the Conclusions of Law of the court:

Plaintiff's Proposed Conclusion of Law No. 1, subdivisions 1, 2, 3, 4, 5 and 6.

Plaintiff's Proposed Conclusion of Law No. 2.

Plaintiff is entitled to judgment in accordance with the findings and conclusions. Plaintiff is entitled to judgment enjoining and restraining each of the defendants, Sylvester T. Bauer, Raymond Kunz, John Marriott, and Gilbert Reuter, in accordance with these findings and conclusions of law.

Plaintiff may submit findings and conclusions in accordance with this decision for signature.

Dated March 19, 1940.

OTTO H. BREIDENBACH,
Circuit Judge.

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